No. 81-1003

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KEVIN H. WHITE, MAYOR OF THE CITY OF BOSTON; CITY OF BOSTON; THE BOSTON JOBS COALITION, INC.,

Petitioners,

v.

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC.; MASSACHUSETTS STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, AFL-CIO; *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

BRIEF *AMICI CURIAE* OF THE AFFIRMATIVE ACTION COORDINATING CENTER THE NATIONAL CONFERENCE OF BLACK LAWYERS THE NATIONAL LAWYERS GUILD THE CENTER FOR CONSTITUTIONAL RIGHTS COMMUNITY RENEWAL SOCIETY OF CHICAGO, INC.

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CONSENT OF PARTIES

Amici Curiae file this brief with the consent of both parties in support of the position advanced by the Petitioners. Letters of consent have been filed with the Clerk of this Court.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI CURIAE	1
INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT	3
ARGUMENT:	
ARTICLE I § 8 cl. 3, THE COMMERCE CLAUSE, OF THE U.S. CONSTITUTION IS NOT VIOLATED BY THE BOSTON MEO REQUIRING A 50% CITY RESIDENTS PREFERENCE AS PART OF AN AFFIRMATIVE ACTION PLAN DESIGNED TO INCREASE THE EMPLOYMENT OPPORTUNITIES OF BLACKS AND OTHER MINORITIES ON PUBLIC WORKS PROJECTS CONTRACTED FOR BY THE CITY	5
A. The Boston MEO Serves A Legitimate Local Interest	6
1. The Thirteenth Amendment Commands the eradication of all badges and incidents of slavery and involuntary servitude	6
2. The well-documented, gross exclusion of Blacks and other minorities from the building construction industry is a badge and incident of slavery	9
3. When the provisions of the Boston MEO are read together in light of the totality of circumstances surrounding its development and implementation, the MEO is a reasonably designed affirmative action plan rationally related to its legitimate Thirteenth Amendment interest	14
B. The De Minimis Burden Imposed On Interstate Commerce By the MEO Is Clearly Outweighed By Boston's Thirteenth Amendment Interest	17
CONCLUSION	20
APPENDIX	

TABLE OF AUTHORITIES

Cases: Page

Cities Services v. Peerless, 340 U.S. 179 (1970) 5
Civil Rights Cases, 109 U.S. 3 (1883) 7, 13
Dred Scott v. Sanford, 60 U.S. 393 (1856) 8
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 17
Fullilove v. Klutznick, 448 U.S. 448 (1980) 3
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 17
Hughes v. Oklahoma, 441 U.S. 322 (1979) 5
Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977) 5
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 7, 8, 20, 21
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 5
Leisy v. Hardin, 135 U.S. 100 (1890) 19
McCulloch v. Maryland, 17 U.S. 316 (1819) 18, 21
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 20
Palmer v. Thompson, 403 U.S. 2 (1971) 20
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) .. 5
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 3, 14
Runyon v. McCrary, 427 U.S. 160 (1976) 7, 8
Southern Pacific v. Arizona, 325 U.S. 761 (1945) .. 5
Sturges v. Crowinshield, 17 U.S. 122 (1819) 5
United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 3, 11, 13, 14

United States Constitution:

U.S. Const. Art. I, Section 8, clause 3 .....3, 4, 5, *passim*
U.S. Const. Amend. XIII .....4, 6, 7, *passim*

Miscellaneous Local Provisions:

City of Boston, Office of the Mayor, Executive Order 15, 16
City of Boston, Supplemental Minority Participation and Residents Preference Section .....2, 3, 4, 5, *passim*

TABLE OF AUTHORITIES—Continued

Books and Articles: Page

G. Bentley, A History of The Freedmen's Bureau (1st ed. 1955) 10
J. H. Franklin, From Slavery To Freedom (3rd ed. 1969) 9
E. Freund, The Police Power (1904) 19
W. Goodell, The American Slave Code (1st ed. 1968) 9
Gould, Black Workers in White Unions (1977) 11
Hall, Black Vocational Technical and Industrial Arts Education (1st ed. 1973) 11, 12
F. Jones, The Changing Mood In America (1st ed. 1977) 18
A. L. Higginbotham, In the Matter of Color (1st ed. 1978) 9
Karson and Radosh, *The American Federation of Labor and the Negro Worker: 1894-1949* in The Negro and The American Labor Movement, (Jacobson ed. 1968) 12
A. Kinoy, The Constitutional Rights of Negro Freedom, 21 Rutgers L. Rev. 387 (1967) 6
A. Kinoy, The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on *Jones* v. *Alfred H. Mayer Company*," 22 Rutgers L. Rev. 537 (1968) 6, 7
Marshall, The Negro and Organized Labor (1965) 11
Marshall, "*The Negro and Southern Union*" in The Negro and the American Labor Movement (Jacobsen ed. 1968) 12
McFeely, "*The Freedmen's Bureau and Federal Action in Race Relations*, Key Issues In the Afro-American Experience, Vol. II (Huggins, Kilson & Fox ed. 1971) 10
Marshall and Briggs, The Negro and Apprenticeship (1967) 11, 12
W. McFeeley, Yankee Stepfather: General O. Howard and the Freedmen (1968) 10
G. Myrdal, An American Dilemma (Harper & Row ed. 1962) 11, 12, 18

TABLE OF AUTHORITIES—Continued

	Page
Northrup, Organized Labor and the Negro (1944)	11
Hill, Black Labor and the American Legal System: Race, Work and the Law (1977)	11
Report of the National Advisory Commission on Civil Disorders (1968)	2
W. Rose, Rehearsal for Reconstruction: The Port Royal Experiment (1st ed. 1965)	10
State Advisory Committee, United States Commission on Civil Rights, 50 States Report (1961)	11
G. Simpson & J. Yinger, Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination (4th ed. 1972)	6
Spero and Harris, The Black Worker (Atheneum ed. 1962)	11
J. tenBroek, Thirteenth Amendment to the Constitution of the United States, 39 Cal. L. Rev. 171 (1951)	19
L. Tribe, American Constitutional Law (1st ed. 1978)	5
United States Commission on Civil Rights, Affirmative Action in the 1980's: Dismantling the Process of Discrimination (1981)	13, 18
United States Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions (1976)	12, 13, 16
Weaver, Negro Labor, A National Problem (1964)	11
Buchanan, A Quest for Freedom: A Legal History of the Thirteenth Amendment, 12 Houston L. Rev. 1 (1974-75)	19

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INTEREST OF *AMICI CURIAE*

The national and local organizations joining in this brief as *amici curiae* (see appendix) represent many sectors of American society concerned with the public interest.

Amici increasingly have become concerned about the continuing, systemic race discrimination that exists throughout the country. They also have been attentive to the desperate and often violent responses by the victims of this discrimination. The awesome predictions of the Report of the U.S. Commission on Civil Disorders in 1968,[1] that the country was moving toward two separate and unequal societies, one white and one Black, has assumed heightened contemporary relevance as the economic, social and political gap between Blacks and whites clearly continues to broaden.

Amici share a particular common concern about the continuing exclusion of Black and other minorities from jobs, skills training, and promotional opportunities, which is one of many sorry legacies of slavery and racial discrimination. They are aware that affirmative action plans like that contained in the Boston Mayoral Executive Order are important vehicles, and in many instances the only effective means, by which to begin the long process of remedying this historic exclusion.

Amici recognize that this Court is the ultimate guardian of the Constitution. Decisions of this Court not only affect the living corpus of American law but also the nature and character of American life. Indisputably, these are troubled times. There has been a rapid rise in the pervasive unwillingness of the American people and their institutions to address, much less resolve, racial problems. Amici, nonetheless, fervently share a mutual hope that this Court will reverse the judgment below in this case and advance, not set back, the struggle to rid our nation of the twin haunting spectres of racial discrimination and racial hatred.

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[1] *Report of the National Advisory Commission on Civil Disorders*, at 398. (1968)

INTRODUCTION AND SUMMARY OF ARGUMENT

The instant case presents this Court with yet another opportunity to review the validity of race conscious affirmative action policies adopted to alleviate a portion of the burden of racial oppression imposed by this country's tragic history.

Regents of the University of California v. Bakke, 438 U.S. 265 (1978), presented the admissions policy of a state university's medical school which reserved a number of seats for qualified minority applicants for review. In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) a voluntary agreement between a private employer and a union to reserve one-half of the seats in a newly established training program for minority employees was challenged. And, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court examined the affirmative action set-aside, "minority business enterprise" (MBE) provision in the Public Works Employment Act of 1977.

In this case, Respondents covertly seek the imprimatur of this Court to impair significantly, and to destroy ultimately, as a practical matter, the affirmative action efforts of a local government designed to eradicate one of the continuing vestiges of American slavery. To affirm the decision below would require this Court to deny present reality, the lessons of history, and the importance and intractability of America's continuing problems of race relations.

The narrow Commerce Clause arguments advanced by the court below and the briefs of the parties ignore or minimize the integral relationship between the challenged residents' preference and the more explicit affirmative action goals of the Mayoral Executive Order (hereinafter MEO).

Amici argue that when the provisions of the Boston MEO are read together, as they must be, it becomes

clear that the MEO does not violate the Commerce Clause. The de minimis or "incidental" burden imposed on interstate commerce clearly is outweighed by the Thirteenth Amendment reservoir of power for all levels of government to aid in the eradication of the badges and incidents of slavery. The well-documented, gross exclusion of Blacks and other minorities from the building construction industry is one of those badges and incidents that has survived slavery and perpetuates second class citizenship. Inclusion of the 50% residents' preference as one provision of the MEO was a reasonable response to the white racism and overt racial hostility that threatened effective implementation of the affirmative action plan. As such, the MEO falls well within the parameters of the remedial flexibility to which local governments are entitled when seeking to implement the mandate of the Thirteenth Amendment.

ARGUMENT

ARTICLE I § 8 cl.3, THE COMMERCE CLAUSE, OF THE U.S. CONSTITUTION IS NOT VIOLATED BY THE BOSTON MEO REQUIRING A 50% CITY RESIDENTS PREFERENCE AS PART OF AN AFFIRMATIVE ACTION PLAN DESIGNED TO INCREASE THE EMPLOYMENT OPPORTUNITIES OF BLACKS AND OTHER MINORITIES ON PUBLIC WORKS PROJECTS CONTRACTED FOR BY THE CITY.[2]

The Commerce Clause does not explicitly prohibit all state regulation of interstate commerce. The clause merely grants to the U.S. Congress the power to regulate in interstate commerce.[3] Any limitations on state power to regulate in this area therefore must be implied from the nature of the power vested in Congress. *Sturges v. Crowinshield*, 17 U.S. 122, 193 (1819). Review of a state regulation affecting interstate commerce involves a three-tiered analysis: 1) Does the regulation only incidentally affect or discriminate against interstate commerce?; 2) Does the regulation serve a legitimate local interest?; and if so, 3) are there alternative means to effectuate this interest with no impact on interstate commerce? When questions 1 and 2 are answered affirmatively and question 3 negatively, the challenged state regulation should not be prohibited by the Commerce Clause.[4]

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[2] We support the position of Petitioners that the Commerce Clause does not even apply to the Boston MEO.

[3] Article I, Section 8, clause 3 states: "The Congress shall have power

> . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;".

[4] *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977); *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970); *Cities Services v. Peerless*, 340 U.S. 179 (1950); *Southern Pacific v. Arizona*, 325 U.S. 761 (1945); L. Tribe, *American Constitutional Law*, at 320-326 (1st ed. 1978).

A. The Boston MEO Serves A Legitimate Local Interest

1. *The Thirteenth Amendment Commands The Eradication Of All Badges And Incidents Of Slavery And Involuntary Servitude.*[5]

For nearly one hundred years, except on rare occasions, the nation has failed to acknowledge or define the new national substantive rights enacted when the Thirteenth Amendment abolished the institution of chattel slavery.[6] However, the U.S. Supreme Court has concluded that the Thirteenth Amendment not only authorizes Congress to outlaw all forms of slavery and involuntary servitude, in-

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[5] In this brief, *Amici* emphasize the excluded condition of Black Americans. Native Americans, Latino-Americans and Asian-Americans are also persons of color belonging to racial classes. Social scientists have defined minorities as groups of people " 'who, because of their physical or cultural characteristics, are singled out from the others in society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination. The existence of a minority in a society implies the existence of a corresponding dominant group with higher social status and greater privileges. Minority status carries with it the exclusion from full participation in the life of society.' " G. Simpson & J. Yinger, *Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination* at 11 (4th ed. 1972) (emphasis added). Pursuant to Title VII of the Civil Rights Act of 1964, the United States Equal Employment Opportunity Commission requires reporting firms to provide periodic employment statistics on Blacks, Orientals, American Indians, and Spanish surnamed Americans. The EEOC has recognized these groups because they fit the social science definition. These other racial minorities also have been victimized by White supremacy—a relic of slavery—it is therefore appropriate to develop remedies which include these groups although they were not the original intended beneficiaries of the Civil War Amendments.

[6] A. Kinoy, *The Constitutional Rights of Negro Freedom*, 21 Rutgers L. Rev. 387 (1967) (hereinafter Kinoy I); A. Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on "Jones v. Alfred H. Mayer Company"*, 22 Rutgers L. Rev. 537 (1968) (hereinafter Kinoy II).

cluding all badges and incidents, but also contains a reflex or self-executing charter nullifying state laws upholding slavery and establishing universal civil and political freedom nationally.[7] These propositions reflect current controlling law that has been reaffirmed by this Court twice during the last decade.[8]

In fact, the only real issue left for debate is how to determine what is a badge or incident of slavery appropriate for Thirteenth Amendment remediation. The historic debate between Justice Bradley, writing for the majority, and Justice Harlan, dissenting, directly addressed this question. Justice Bradley viewed the badges and incidents of slavery limited to the literal, legal disabilities or trappings imposed on slaves "that interfered with their fundamental rights" of citizenship. 109 U.S. 3, 22.

> Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance

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[7] Civil Rights Cases, 109 U.S. 3, 20, 34-36 (1883).

[8] *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160 (1976).

In *Jones*, the Court upheld an effort by Black citizens to invoke federal equity power to restrain racial discrimination by private individuals in the sale of real estate. The Court found statutory authority for this exercise of federal judicial power in one of the original Reconstruction Statutes, the Civil Rights Act of 1866. Section one of this Act provided that "citizens of every race and color . . . shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens. . . ." In resting judicial action upon this statutory basis the Court was forced to face the ultimate question of the source for Congressional legislation in the area of Negro rights in the power created by the Thirteenth Amendment " 'to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.' " Kinoy II, *supra*, at 538, 539 (footnotes omitted).

> and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. *Id.*

This position was ahistorical and unsupported by the legislative history of the Thirteenth Amendment, but necessary to support a rejection of the Civil Rights Act of 1875.

Justice Harlan, on the other hand, urged a more expansive reading of what were badges and incidents based on the understanding that the Thirteenth Amendment completely overruled the odious racial inferiority and white supremacy theories enunciated in *Dred Scott v. Sanford*, 60 U.S. 393 (1856)

> . . . I hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adoption of [the Thirteenth] amendment and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character. . . . 109 U.S. 3, 36 (citations omitted)

While it is important to note that it is the more expansive view of Justice Harlan which has withstood the test of time, the facts presented in this particular case fall within the parameters set by Justice Bradley and subscribed to in the *Jones* and *Runyon* opinions.

2. *The Well-Documented, Gross Exclusion Of Blacks And Other Minorities From The Building Construction Industry Is A Badge And Incident Of Slavery.*

The virtually total exclusion of Blacks from the economic mainstream was crucial to the maintenance of the slavery system.[9] The states collectively used their laws to deny Blacks any opportunity to own, rent, inherit or otherwise acquire property, to acquire marketable skills through gainful employment or to engage in trade or commerce.[10] This total deprivation of any basis for economic independence left slaves with no options but complete dependency on the masters' absolute control. Slaves were property.

Despite emancipation and the best intentions of the framers of the Thirteenth Amendment and the initial Civil Rights Acts, the Freedmen were not included in the American economic mainstream.[11]

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[9] A.L. Higginbotham, *In the Matter of Color*, at 9 (1st ed. 1978); W. Goodell, *The American Slave Code*, at 96 (1st ed. 1968); J.H. Franklin, *From Slavery to Freedom*, at 187 (3rd ed. 1969).

[10] See generally Goodell, *supra*.

[11] Slavery, at its root, was an economic phenomenon. Hence, it is not surprising that a prime concern of the framers of the Thirteenth Amendment was the economic well-being of newly freed Blacks. Congress was concerned that Blacks be accorded civil and political rights in order that they could protect and advance themselves economically. The Black Codes—i.e. the legislation passed in Southern states designed to return Blacks to a state of semi-slavery—was never from the mind of Congress in enacting the anti-slavery amendment. Representative Godlove Orth of Indiana acknowledged that something more than merely the right not to be held as property was involved in abolition and added that the right of "personal freedom without distinction" was involved. Ebon C. Ingersoll of Illinois stressed that the amendment would bring Blacks the right to enjoy the rewards of their labor. James Harlan of Iowa emphasized that the amendment would give Blacks the right to own property—and, strikingly, the right to protect and advance their property rights by the right to bring suit, testify in court and to speak and write freely. Cong. Globe, 38th Congress, 2d Sess., 143 (January 6, 1865); *See e.g.* 38th Congress, 1st Sess. 1463 (April 7, 1864); 38th Congress, 2d Sess., 487 (January 28,

In the years immediately following the conclusion of the Civil War, one southern state after another enacted

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1865). Though there was not unanimity in Congress regarding the plan of some legislators (Sumner, Thaddeus Stevens, George Julian, Benjamin Wade, *et al.*) to allocate land to the freedmen, there was recognition that "special measures" had to be taken if Blacks were not to fall back into a second-class economic status. Congressional reports and documents of that era are replete with this concern. House Executive Documents, Report of the Secretary of the Treasury on the State of the Finances for the Year 1864: General Regulations Concerning Commercial Intercourse, Abandoned Property and the Employment and General Welfare of Freedmen; [No. 3, 38th Congress, 1st Sess.] Senate Executive Documents, Preliminary Report Touching the Condition and Management of Emanicipated Refugees, Made to the Secretary of War by the American Freedman's Inquiry Commission; [No. 53, 38th Congress, 1st Sess. (1864)]. Senate Executive Documents, "Final Report of the American Freedmen's Inquiry Commission to the Secretary of War [No. 53, 38th Congress, 1st Sess. (1864)]. The Freedmen's Bureau was both the clearest expression of congressional concern about the economic plight of the freedom and the clearest expression of the reach of the Thirteenth Amendment. Though some have argued otherwise, it is certain that the Freedmen's Bureau was seen as a concrete realization of the anti-slavery amendment and was based upon it; *See* G. BENTLEY A HISTORY OF THE FREEDMEN'S BUREAU, at 117, (1st ed. 1955). This was the view of conservative, moderate and so-called "radical" Congressmen alike. This is also the view of the two leading authorities on the Freedmen's Bureau and post-bellum land reform. *Compare*, W. amendment and was based upon it; *See* G. BENTLEY, *A History of the Freedmen's Bureau*, at 117, (1st ed. 1955). This was the ROSE, *Rehearsal for Reconstruction: The Port Royal Experiment*, (1st ed. 1965); W. MCFEELY, *Yankee Stepfather: General O. Howard and the Freedmen*, at 199, 267 (1968); *See also*, MCFEELY, *Unfinished Business: The Freedmen's Bureau and Federal Action in Race Relations, Key Issues in the Afro-American Experience*, Vol. II, at 5 (Huggins, Kilson & Fox ed. 1971). Congress recognized and the Bureau proceed to implement the incontrovertible fact that thep eculiar status of Blacks as a result of slavery, necessarily meant that peculiar legislation had to be designed to fit their needs. In that sense, *the Freedmen's Bureau can be seen reasonably as an early form of what is known today as "affirmative action," Further, the fact that the architects of the Thirteenth Amendment alos authored the Freedmen's Bureau, is recognition of the sound constitutional basis for "affirmative action."*

Black Codes that locked Blacks into a subordinate status.[12] Employment practices deliberately were designed to confine Blacks to specific jobs in the labor market. In no area was the pressure more intense than in the skilled trades.[13]

Apprentice programs were practically all closed to Blacks by law or practice.[14] Only inferior racially segregated vocational education was available to Blacks, a situation which continued well into the 1970's.[15]

After the turn of the century, Black access to skilled craft training and/or jobs became even more restrictive as union control and influence increased in the labor

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[12] The enactment of the Black Codes regulated the conditions of freedmen's labor and subjected them to the control of their former masters or other white men. While these codes were abolished during the period of Reconstruction, they later reappeared. G. Myrdal, *An American v. Dilemma* at 228 (Harper & Row ed. 1962).

[13] See, *United Steelworkers of America v. Weber, supra,* at 195, fn. 1. By the end of the Civil War, 80% of all skilled tradesmen in the south were Black because slaves with skills had a greater market value and could generate more income. Spero and Harris, *The Black Worker,* at 16 (Atheneum ed. 1962); Myrdal, *supra,* at 1101.

For a full treatment of Blacks in the workplace during this period, see Spero and Harris, *supra*; Myrdal, *supra,* at 1097-1124.

A thorough discussion of Black workers during the period from World War I through World War II is found in Weaver, *Negro Labor, A National Problem* (1964); and of Blacks in labor unions in Marshall, *The Negro and Organized Labor* (1965); Marshall and Briggs, *The Negro and Apprenticeship* (1967); and Northrup, *Organized Labor and the Negro* (1944). For more recent discussions, see Hill, *Black Labor and The American Legal System: Race, Work and the Law* (1977), and Gould, *Black Workers in White Unions* (1977).

[14] Spero and Harris, *supra,* at 5-6; Myrdal, *supra,* at 887.

[15] Marshall, *supra*; *Weaver, supra*; Hall, *Black Vocational, Technical and Industrial Arts Education* (1st ed. 1973); State Advisory Committee, United States Commission on Civil Rights, *50 States Report,* (1961) (hereinafter 50 States).

market.[16] While the newer crafts were not quite as bad as some of the older ones,[17] many excluded Blacks by express constitutional provision or ritual requirement,[18] while others used a series of unwritten practices.[19]

As a result, Blacks have been unable to get a share of the increased skilled craft jobs and their numbers have decreased substantially from 1865-1940[20] and 1950-1965.[21] In spite of the enactment and enforcement of Title VII, the enforcement of federal, state and local Executive Orders, and the adoption of voluntary affirmative action;

> the effect of intentional and direct employment discrimination in the building trades continue [sic] to be severe. The proportion of unions that neither discriminate directly nor intentionally or that do not continue to use widely practiced institutional mechanisms that adversely affect the employment opportunity of minorities and women is unfortunately quite small.

United States Commission on Civil Rights, *The Challenge Ahead: Equal Opportunity in Referral Unions* at 94 (1976) (hereinafter Challenge) (footnote omitted).

The continuing relevance of discriminatory union practices already has been recognized by this Court. "Judicial

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[16] Myrdal, *supra*, at 1102.

[17] *Ibid*; Hill, *supra*, at 235-247.

[18] Karson and Radosh, "The American Federation of Labor and the Negro Worker, 1894-1949" in *The Negro and The American Labor Movement*, at 157-158, ed. Jacobsen (1st ed. 1968) (like the Machinist and the Boilermakers).

[19] *Ibid.* at 158; Marshall, "The Negro in Southern Unions" in *The Negro and the American Labor Movement*, at 145, ed. Jacobsen (1st ed. 1968).

[20] Myrdal, *supra*, at 1101; Northrup, *supra*, at 18-19.

[21] Marshall and Briggs, *supra*, at 3.

findings of exclusion from crafts on racial grounds numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers of America v. Weber*, *supra*, at 195, fn. 1.[22]

The promise of the Thirteenth Amendment remains just that—a broken unfulfilled promise to recast the position of Blacks and other minorities in the economic and political life of America. The pernicious and persistent exclusion of Blacks from full participation in the skilled crafts and other positions within the building construction industry is the direct result of a cohesive system of stigmatization. In a society in which a person is measured, in large part, by their work, in quality, nature and remuneration, a direct consequence of this exclusion is the denial of "those fundamental rights which are the essence of civil freedom, namely the right to make and enforce contracts . . . and to inherit, purchase, lease, sell and convey property." *Civil Rights Cases*, *supra*, at 22. In addition, this exclusion refuels general white misperceptions that Blacks and other minorities are inferior. This, in turn, becomes self-perpetuating as the justification for continuing the exclusion not only in this area but throughout American society.[23] These consequences are the very essence of the badges and incidents of slavery that the Thirteenth Amendment demands be eradicated.

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[22] See also, Challenge, *supra*, at 58-94 (a summary of judicial findings of discrimination by craft unions).

[23] U.S. Commission on Civil Rights, *Affirmative Action in the 1980's: Dismantling the Process of Discrimination* (1981) (hereinafter Affirmative Action Statement).

3. *When The Provisions Of The Boston MEO Are Read Together And In Light Of The Totality Of Circumstances Surrounding Its Development And Implementation, The MEO Is A Reasonably Designed Affirmative Action Plan Rationally Related To Its Legitimate Thirteenth Amendment Interest.*

An accurate chronological history of the Boston MEO is noticeably absent from the record in this case. Neither the opinion of the court below, the Agreed Statement of Facts, nor the briefs in support of or opposition to the petition for certiorari fully develop this factual history. Yet this history is crucial to an understanding by the Court of the real issue posed by this case. The purposes of the residents preference cannot be appreciated fully separate from the purposes of the whole MEO. In this respect, the case is reminiscent of several other landmark cases presented to this Court for decision during recent terms.[24] But, there is a difference in this case. Defendant-Intervenor in this action, the Boston Jobs Coalition (hereafter BJC) virtually alone has labored to present and build an accurate and factually detailed record,[25] while alerting a broad based coalition of groups to the potential significance of this case for the practical future of local affirmative action plans. A brief recapitulation of the facts will make this clear.

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[24] The eight page trial record in Regents of the *University of California v. Bakke, supra* is now a legend, along with the University stipulation that Bakke would have been admitted if no special admissions program had existed. The absence of any readily available evidence of past racial discrimination by defendants in *United Steelworkers of America v. Weber, supra* led some of the current *amici* to file a motion to intervene before this Court on behalf of several Black workers at the Kaiser Gramercy, Louisiana plant.

[25] See generally, Motion of BJC, Inc. to intervene as Defendant and accompanying affidavit before the United States District of the District of Massachusetts (hereinafter Motion) and Brief for BJC, Defendant-Intervenors, on Complaint for Declaratory Judgment before the Massachusetts Supreme Judicial Court (hereinafter Brief).

Responding to pressure from the Black and Hispanic communities in Boston, the Mayor promulgated an Executive Order (hereinafter EO) requiring specific affirmative action contract provisions be incorporated into all construction contracts signed by any city department. Adopted on July 31, 1975, the order was entitled "City of Boston Supplemental Equal Employment Opportunity Anti-Discrimination and Affirmative Action Program Contract Provision." Contractors and subcontractors were required to maintain a fixed per cent of minority participation in all jobs with preference to be given first to Boston, then Massachusetts, residents in certain job categories involving training opportunities. The 1975 EO noticeably increased minority employment on city-funded construction projects. Unfortunately, although predictably, it also exacerbated the well-known high level of racial tension in the city and actually resulted in several hostile physical confrontations between white and minority construction workers which were well publicized by the local media. Created in 1976, the BJC was a response to this situation. The main activities of BJC were devoted to finding a non-violent solution to these racial hostilities and alleviation of the racial tension. Revision of the 1975 EO to the form of the present challenged MEO was first proposed by the BJC in June, 1977, and finally signed into law by the Mayor on September 11, 1979, as a supplement to the 1975 EO, after three years of BJC meetings with the various interested groups.

The Respondents carefully framed their challenge to the residents' preference in total disregard to this history. They aggressively have resisted any attempts by Petitioners to introduce the alleviation of the aggravation of racial tension in the City of Boston as one of several purposes of the challenged Executive Order. In fact, Petitioners were forced to compromise significantly on this purpose in order to obtain an Agreed Statement of Facts (hereinafter ASF) (Petition, *supra*, at A30-A47). As a result only two paragraphs in the AFS address this critical issue.

This Court must not allow a patent miscarriage of justice to occur because of Respondents' questionable tactics in shaping the factual presentation of this case. The City of Boston not only had a protectable right to promulgate an affirmative action plan, but an arguable mandate to do so, pursuant to the Thirteenth Amendment, to help Black and other minority workers overcome historic exclusion from the construction trade industry. Unfortunately, many whites, particularly in the predominantly white working class neighborhoods of Boston, as a result, perceived minorities as a favored class who were stealing jobs from unemployed whites.[26] This perception encouraged a general escalation in white antagonism toward Blacks and specific physical confrontations between white and Black workers that jeopardized future enforcement of the EO. This was the political reality that the city had to face. Under the circumstances, separation of the residents' preference from the minority preference was not only reasonable, but actually necessary in order to make the affirmative action plan work at all. As clearly stated by Defendant-Intervenors

> the residency provisions have never had an existence or purpose separate from the minority and women preference provisions. Rather they have always been an integral part of an overall strategy to provide equal employment opportunities for minorities and women, to increase the employment of Boston residents on city-funded construction projects, and to calm the racial antagonisms which have had a very destructive effect upon life in the City of Boston. (Brief at 16)

By joining the residents' preference with the affirmative action provisions, the MEO gave white city workers

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[26] See *Brief*, at 15, indicating that in September, 1979, 62% of the jobs on city-funded construction projects were held by non-residents of Boston. It also is well-documented that the nepotistic recruitment policies and practices of the skilled craft unions have an exclusionary impact on anyone, Black or White, without pre-existing relationship to the unions. See, *Challenge, supra*, at 86-90.

enough of a stake to decrease their enmity and thus allowed effective implementation of the affirmative action provisions. A failure by this Court to reverse the decision of the court below would strangle the ability of other local government entities to implement effective affirmative action plans.[27]

B. The De Minimis Burden Imposed on Interstate Commerce By The MEO Is Clearly Outweighed By Boston's Thirteenth Amendment Interest.

The parties have stipulated that the MEO will have no significant impact on the interstate market. (Petition for Writ of Certiorari in the Supreme Court of the United States at A41 (hereinafter the Petition)) This would seem controlling. It is undue interference with the Congressional power to regulate interstate commerce that is protected by the Commerce Clause, not the speculative impact of a local regulation on a few particular interstate businesses. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

On the other hand, the Boston MEO constitutes a direct and substantial effort to implement the Thirteenth Amendment command to eradicate the badges and inci-

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[27] There has been a steady increase in racial violence around construction sites in New York City. The situation is so tense that unions are hiring armed guards for the sole purpose of preventing local minority job applicants from entering the work sites to apply for employment. The resulting violent confrontations have led a court to award both temporary and permanent injunctions. The only affirmative step presently being pursued to remedy this volatile situation emanates from the Mayor's office. The Mayor has created an Office of Construction Industry Relations to recommend ways in which he can fashion an executive order to reduce racial violence in the construction industry. The most promising suggestion has been promulgation of an executive order requiring proportional hiring of underprivileged city residents. Any decision upholding the Massachusetts Supreme Court decision clearly would stymie this initiative.

dents of slavery. Race-conscious affirmative action plans like the Boston MEO, to date, are the only effective method for breaking up interdependent and self-perpetuating institutionalized systems of racial exclusion.[28]

The parties have stipulated that the Boston MEO will increase the number of Blacks and other minorities who will be employed on affected public works construction projects [29] as well as diminish Boston racial tensions and hostilities.[30] The MEO will provide many Blacks and other minorities with their first real opportunity for training and employment in the building construction industry. For many, Black and white alike, the MEO will lead to their first interaction with someone of a different race, the first step in the long process of hopefully changing the negative racial stereotypical views of white workers.[31]

The Thirteenth Amendment fully supports the Boston MEO. Thirteenth Amendment power is not vested exclusively in the federal government.[32] As a constitutional self-executing charter of "universal civil and political freedom," [33] to obliterate all "badges and incidents" of slavery, no specific grant of power need be made to the

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[28] Affirmative Action Statement, *supra*, at 3, 30-41.

[29] Petition, *supra*, at A36.

[30] *Ibid.*, at A37.

[31] See, generally, Myrdal, *supra*, at 3-157, 1099-1105; F. Jones, *The Changing Mood In America*, at 1-48 (1st ed. 1977).

[32] Within our federal scheme, the express enforcement power given to Congress by Section 2 of the Thirteenth Amendment is not a limitation on state power to enforce. It merely reflects the fact that the federal government can only act when the federal Constitution so states expressly or by implication. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[33] See Section A, part 1.

states to authorize enforcement. Such power is inherent in the residual or police powers of the state.[34]

This was made clear by supporters of the Thirteenth Amendment in post-ratification debates concerning the constitutionality of the Civil Rights Act of 1866 which was passed pursuant to Thirteenth Amendment authority. "So far as there is any power in the states to . . . enlarge or declare civil rights, all these are left to the states [by the Thirteenth Amendment and acts adopted pursuant thereto]. Cong. Globe, 39th Cong., 1st Sess. at 1832 (1866). Senator Trumbell also remarked about "local legislation" to "provide for the real freedom" of former slaves. *Id.* at 77. In addition, many supported passage of the Thirteenth Amendment because of their philosophical belief in "natural rights." The thought that individual states would be precluded in some way from effectuating the Thirteenth Amendment would have been an anathema to them.[35]

It also is instructive, to note how Representative Bingham, the prime framer of the Fourteenth Amendment, discussed the role of state governments in explaining the need for that amendment:

> The nation cannot be without that constitution, which made us one people; the nation cannot be without the state governments to *localize and enforce* the rights of the people under the constitution . . . *centralized power, decentralized administration expresses the whole philosophy of the American system.*

Cong. Globe, 42nd Cong., 1st Sess., Appendix at 85 (1871) (emphasis added)

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[34] *Leisy v. Hardin*, 135 U.S. 100 (1890); A classic explication on the police powers of the states can be found in E. Freund, *The Police Power* (1904).

[35] See J. tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 Cal. L. Rev. 171, 197-200 (1951); Buchanan, *A Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Houston L. Rev. 1, 18-21 (1974-75).

Since the Boston MEO is not in conflict with the Commerce Clause and effectively seeks to implement the mandate of the Thirteenth Amendment, it must be upheld.

CONCLUSION

Local governments are entitled to remedial flexibility when implementing Thirteenth Amendment policy. Since the present MEO imposes a de minimis burden on interstate commerce, a more attractive alternative would have to impose *absolutely no burden* on interstate commerce and promote the state interest just as well as the present MEO. Neither respondents nor the court below have met the burden of showing that any such alternative exists. The building construction industry consistently has refused to develop private voluntary efforts to increase the number of Blacks and other minorities employed.

An affirmance of the decision below in this case essentially would place Respondents in exclusive charge of insuring that, once and for all, more than a token number of Blacks and other minorities are employed successfully in the building construction industry—a responsibility which they have not fulfilled satisfactorily during the past 100 years.

Nor should the Court view the City of Boston as constrained by the same legal rules implicated in the badges and incidents of servitude which, for institutional reasons, arbuably might restrict a court. Other social institutions including state and local governments, are fully competent to go further. Compare, *Palmer v. Thompson*, 403 U.S. 217 (1971) with *Jones v. Alfred H. Mayer Co.*, *supra*. "It is one of the happy incidents of the federal system that a single courageous state may . . . serve as a laboratory, and try novel social and economic experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 266, 311 (1932). It is especially appropriate that local governments have the power to experiment with remedies when they are attempting to insure fundamental rights.

The Boston MEO is admittedly such an experiment that clearly meets the test adopted in *Jones v. Alfred H. Mayer Co.*, *supra* from *McCulloch v. Maryland*, *supra*:

> Let the end be legitimate, let it be within the scope of the Constitution; and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional . . .
> 392 U.S. at 443

The Boston MEO is constitutional. The decision below should be reversed.

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APPENDIX

INDEX TO APPENDIX

	Page
Accion Latinomerica de Aurora	3a
Affirmative Action Coordinating Center	1a
American Friends Service Committee	12a
Arizona Farmworker Union	13a
Asian Legal Services Outreach, Inc.	3a
Association of Community Organizations For Reform Now	13a
Association of Farmworker Opportunity Programs	13a
Atlanta Working Women	3a
Black American Law Student Association	4a
Camden Citizens Coalition	4a
Center for Constitutional Rights	2a
Center for Third World Organizing	4a
Citizens Action League	4a
Citizens for Community Improvement	13a
Community Organizations Acting Together	3a
Community Renewal Society	2a
Concerned Citizens Congress of Northeast Denver	5a
Concerned Citizens of North Camden	5a
East Los Angeles Community Union	13a
Farmworker Rights Organization	13a
Hartford Area Rally Together	5a
Hispanic American Career Educational Resources, Inc.	5a
Legal Aid Society of Dayton	6a
National Association for the Advancement of Colored People	6a
National Conference of Black Lawyers	1a
National Congress for Community Economic Development	7a
National Lawyers Guild	2a
National People's Action	7a
9 to 5	8a
North Central 7 Community Organization	8a
Ohio Action Training Center	8a
Oakland Community Organization	8a
People's Housing Network	8a
People Organized to Win Educational Rights	9a
Pilsen Neighbors Community Council	9a
Pittsburgh Neighborhood Alliance	9a
Portland West Neighborhood Planning Council	13a

INDEX TO APPENDIX—Continued

	Page
Rural America	9a
St. Louis Association of Community Organization	10a
San Diego Organizing Project	10a
San Franciscans For Reasonable Growth	
South Austin Coalition Community Council	10a
South Bethlehem Coalition	
Southeast Women's Employment Coalition	10a
Southern Arizona Legal Aid	10a
United Cannery Workers Committee	11a
Urban Coalition of Minneapolis	11a
Urban League of Metropolitan Denver	12a
Washington Innercity Self Help	13a
Wilmington United Neighborhood	12a
Women In Employment	12a
Working In Neighborhoods	13a